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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MARTIN SIMON, Defendant.	No. CR-07-0335 SI **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS** Hearing Date: September 7, 2007

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TO: UNITED STATES OF AMERICA, PLAINTIFF; AND SCOTT N. SCHOOLS, UNITED STATES ATTORNEY; AND ALLISON DANNER, ASSISTANT UNITED STATES ATTORNEY.

PLEASE TAKE NOTICE that on September 7, 2007, at 11:00 AM, in the courtroom of the Honorable Susan Illston, or as soon thereafter as this matter may be heard, defendant Martin Simon will, and hereby does, move this Court to dismiss the indictment. This motion is based on the instant notice, the following memorandum of points and authorities, all other applicable constitutional, statutory, and case authority, and such evidence and argument as may be presented at the hearing of this motion.

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INTRODUCTION

Defendant Marin Simon stands accused in this Court of unlawfully possessing a firearm on March 17, 2007. Mr. Simon has been convicted of and sentenced for the very same offense, based on the very same conduct, in San Mateo County Superior Court. He now respectfully moves the Court to dismiss the federal indictment because of highly prejudicial preindictment delay, and because a second prosecution for the same offense violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

BACKGROUND

On **March 17, 2007**, police officers arrested Mr. Simon in San Mateo County on charges of being a felon in possession of a firearm, resisting arrest, and battery on a peace officer.

On **March 29, 2007**, a felony complaint was filed in San Mateo County Superior Court charging Mr. Simon with violations of California Penal Code §§ 12021(a), 69, and 243(c)(2), and Health & Safety Code § 11359.

On **April 13, 2007**, Mr. Simon entered into a plea agreement that his counsel negotiated with San Mateo County Deputy District Attorney Christine Ford. Pursuant to that agreement, Mr. Simon pled no-contest in San Mateo County Superior Court to one count of being a felon in possession of a firearm, in violation of California Penal Code § 12021(a), and one count of resisting arrest, in violation of California Penal Code § 69. In exchange, the State moved to dismiss the remaining counts of the information. Pursuant to the negotiated disposition, the Court imposed a sentence of two years in state prison.

On **April 20, 2007**, the Department of Justice issued a *Petite* waiver authorizing the United States Attorney's Office to prosecute Mr. Simon under 18 U.S.C. § 922(g)(1).

On **May 29, 2007**, a federal grand jury returned an indictment charging Mr. Simon with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

On or about **July 29, 2007**, Mr. Simon was transferred from the custody of the California Department of Correction to the United States Marshals Service pursuant to a writ of habeas

corpus ad prosequendum. On **July 30, 2007**, Mr. Simon made his initial appearance in federal district court.

DISCUSSION

I. The Federal Prosecution of Mr. Simon Violates the *Petite* Policy

Martin Simon faces prosecution in state and federal courts for identical offenses arising out of the same course of conduct. Although the Supreme Court has never held that the Constitution categorically bars state and federal prosecution for the same act or transaction, *see Heath v. Alabama*, 474 U.S. 82, 88 (1985), it has consistently been "mindful of the potential for abuse in a rule permitting duplicate prosecutions." *Rinaldi v. United States*, 434 U.S. 22, 28 (1977).

Responding to this concern, the Department of Justice developed an internal policy commonly referred to as the *Petite* policy. *See* United States Department of Justice, United States Attorneys' Manual ("Manual"), Title 9, § 9-2.031 (2d ed. 2000); *see also Petite v. United States*, 361 U.S. 529, 531 (1960). This policy was designed to prohibit successive prosecutions based on the same transaction or occurrence "except when necessary to advance compelling interests of federal law enforcement." *Rinaldi*, 434 U.S. at 29 & n.14.

The *Petite* policy was enacted not only to promote efficient utilization of federal prosecutorial resources, but also to protect defendants from the unfairness of multiple prosecutions and punishments for substantially the same act or acts. *See id.* at 28 (noting that policy is supposed to "protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause"). As such, it applies "whenever there has been a prior state or federal prosecution resulting in an acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits after jeopardy has attached." Manual, § 9-2.031(C).

Here, Mr. Simon was convicted and sentenced for being a felon in possession of a firearm in San Mateo County. Accordingly, under the *Petite* policy, this successive federal

prosecution is not warranted unless three criteria are satisfied:

> 1) The matter . . . involve[s] a substantial federal interest.
>
> 2) The prior prosecution . . . left that substantial federal interest demonstrably unvindicated.
>
> 3) The government . . . believe[s] that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction.

Manual at 9-2.031(A).

Mr. Simon respectfully submits that these criteria are not satisfied in this case. According to the federal prosecutors' manual, the Department of Justice will generally "presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest." *Id.* at § 9-2.031(D). While this presumption can be overcome when a state sentence is "manifestly inadequate," the manual cites as an example of such inadequacy"a case in which the charges in the initial prosecution trivialized the seriousness of the contemplated federal offense, for example, a state prosecution for assault and battery in a case involving the murder of a federal official." *Id.* Here, by contrast, Mr. Simon's state-court prosecution resulted in a serious felony conviction and a substantial prison term. As such, there is nothing about the state prosecution of this matter that left a federal interest "demonstrably unvindicated."

Unfortunately, the *Petite* henhouse is guarded by the fox; the Court cannot compel the government to adhere its own policy. *See United States v. Snell*, 592 F.2d 1083, 1087 (9th Cir. 1979). It can, however, ensure that the consequences of the government's decision *not* to adhere to the policy do not run afoul of the Mr. Simon's constitutional rights.

II. The Indictment Should Be Dismissed Because Mr. Simon Has Suffered Extraordinary Prejudice As A Result of Preindictment Delay

The Fifth Amendment's Due Process Clause protects a criminal defendant against harm occasioned by pre-accusation delay. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989). When such delay results in prejudice to the accused and offends fundamental conceptions of criminal justice, the appropriate

remedy is dismissal of the indictment. *See Lovasco*, 431 U.S. at 790.

The Ninth Circuit has adopted a two-pronged test to determine whether pre-indictment delay rises to the level of a deprivation of due process. First, a defendant must show that the delay caused actual prejudice. *See United States v. Moran*, 759 F.2d 777, 780 (9th Cir. 1985). Second, the length of the delay must be balanced against the reason for the delay. *See id.* at 781. If compelling the defendant to stand trial under the particular circumstances at issue would offend "the community's sense of fair play and decency," the prosecution violates due process and should be aborted. *See Lovasco*, 431 U.S. at 790 (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)).

Here, the federal government did not indict Mr. Simon until his conviction in state court was final and he had been sentenced for his offense. The prejudice that has inured to Mr. Simon as a result of this delay is extraordinary: Mr. Simon can no longer exercise his fundamental constitutional right to stand trial and testify in his own defense, since any attempt to do so would result in the admission of his plea in state court *to the very same offense* for which he now stands accused. *See* Fed. R. Evid. 609; *Brewster v. City of Napa*, 210 F.3d 1093, 1096 (9th Cir. 2000).[1] Mr. Simon has thus lost a critical witness–himself–as the direct and proximate result of the delay in bringing him to federal court. As the only witness to the events who is not a police officer,[2] Mr. Simon is uniquely capable of offering such testimony at trial. His unavailability as a witness is therefore highly prejudicial to his defense.

In addition to prejudice, the Court must consider the length and explanation for the delay

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[1]The Ninth Circuit has held that actual prejudice does not arise when, during a period of preindictment delay, a defendant sustains a conviction in an *unrelated* case, even though that conviction might be used for impeachment purposes should the defendant testify at trial. *See United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980). The situation at bar is distinguishable in an important respect: The conviction that Mr. Simon sustained was for being a felon in possession of a firearm. As such, admission of the prior conviction at trial would not merely impeach his character or credibility; it would actually establish his guilt.

[2]Discovery supplied by the government reveals that efforts by law enforcement to locate civilian eyewitnesses to the events at issue were unsuccessful.

in bringing Mr. Simon to federal court. In absolute terms, the delay between Mr. Simon's arrest (on March 17, 2007) and his federal indictment (on May 29, 2007) was not excessive. What is significant is that the delay coincided almost perfectly with the state prosecution of Mr. Simon for the same conduct. On April 13, 2007, Mr. Simon was sentenced in San Mateo County Superior Court; exactly one week later, on April 20, 2007, the Department of Justice authorized the United States Attorney's Office to proceed with the federal case.

Dismissal of the indictment is warranted when preindictment delay "caused substantial prejudice to [the defendant's] rights to a fair trial and . . . the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324 (1971). In fact, the government need not have expressly intended to secure a strategic benefit; rather, delay is constitutionally problematic–and may require dismissal–whenever the government acts "in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Lovasco*, 431 U.S. at 296 n.17.

The timing of the federal indictment in this case strongly supports the inference that the United States Attorney's Office waited for Mr. Simon to be convicted in state court before initiating the federal prosecution. The government was surely aware that state-court proceedings were underway, and hence should have appreciated the likelihood that a conviction would ensue. Nonetheless, the federal government apparently took no measures to avert or stay the state-court action pending a federal investigation.

By waiting instead for the state-court conviction to become final, federal prosecutors secured a tremendous tactical advantage in this case: Mr. Simon can no longer defend himself by offering testimony that is at odds with the version of events reported by law enforcement. Such maneuvering in order to "increase the odds of conviction" is, at a minimum, "questionable." *United States v. Ross*, 123 F.3d 1181, 1186 (9th Cir. 1997). When, as here, actual prejudice ensues, the delay violates the defendant's right to due process. *See id.*

The government's decision to await the outcome of the state-court matter before indicting Mr. Simon offends traditional notions of decency and fair play. *See Lovasco*, 431 U.S. at 790. This is not a case in which federal authorities picked up a prosecution that the state elected not to pursue. It is not a case in which the state prosecuted but failed to obtain a conviction. It is not even a case in which the state prosecuted and convicted but failed to send the defendant to prison. Rather, Mr. Simon pled guilty to being a felon in possession of a firearm and was sentenced to state prison for precisely the length of time that state prosecutors recommended.

The government's own prosecutorial manual recognizes that a successive federal prosecution under these circumstances is wrong. Dual sovereignty is not a license to perpetuate the very evil that the Double Jeopardy Clause was designed to prevent, *viz.*, dual punishments for a single offense. *See Rinaldi*, 434 U.S. at 28 (noting that *Petite* policy "protect[s] interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the Double Jeopardy Clause"). That the government has the power to violate the *Petite* policy does not mean that a second punishment is consonant with the values enshrined in the Bill of Rights.

Successive prosecution is especially offensive where, as here, the defendant has no meaningful opportunity to defend himself in the second case. There is a significant difference between a successive prosecution that follows a dismissal or acquittal, and a successive prosecution that follows a conviction. In the former instance, the defendant retains the ability to mount an effective defense in the successive federal proceeding. In the latter event, the defendant is rendered impotent. Having made damaging admissions to resolve identical charges in the first forum, he cannot meaningfully exercise his constitutional right to mount an effective defense in the second.

If it is acceptable for the United States Attorney to prosecute Mr. Simon, it is acceptable–and shockingly easy–for the federal government to re-prosecute virtually *every* defendant who has been convicted and sentenced in state court for a drug- or firearm-related

offense. That cannot be right. The government's delay in bringing Mr. Simon to federal court violated his right to due process, and the federal indictment should therefore be dismissed.

III. The Indictment Should Be Dismissed Because Successive Federal Prosecution For Identical Conduct Is Unconstitutional

In *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Supreme Court held that the Double Jeopardy Clause does not preclude a state prosecution following a federal acquittal for the same offense. *See id.* at 136; *see also Abbate v. United States*, 359 U.S. 187 (1959) (upholding federal prosecution following state conviction). The oft-repeated rationale for this proposition is the doctrine of dual sovereignty, which "rests on the notion that a defendant whose conduct violates the laws of two sovereigns has 'committed two different offenses by the same act.'" *United States v. All Assets of G.P.S. Auto Corp.*, 66 F.3d 483, 493 (2d Cir. 1995) (citation omitted). Under a system of dual sovereignty, "a conviction by a court of one sovereign of the offense against that sovereign is not a conviction of the different offense against the other sovereign, and so is not double jeopardy." *Id.* (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)) (internal quotation marks and alterations omitted).

Mr. Simon recognizes, as he must, that this Court is bound to follow *Bartkus* and the Ninth Circuit decisions that have applied it. *See*, *e.g.*, *United States v. Figueroa-Soto*, 938 F.2d 1015, 1018 (9th Cir. 1991). Nonetheless, he respectfully submits that the reasoning of *Bartkus* has been undercut by subsequent developments in constitutional law, and that the continued application of dual sovereignty in the context of double jeopardy is out of step with the doctrine's demise in the realm of other core constitutional protections.

A. The Foundation of the Doctrine of Dual Sovereignty Was Undercut By *Benton v. Maryland*

In 1847, and again in 1852, the Supreme Court ruled that successive punishment by state and federal governments did not violate the Fifth Amendment because the Double Jeopardy Clause was "exclusively [a] restriction[] upon federal power." *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434 (1847); *see also Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852). This notion

proceeded from an even older decision–*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)–holding that the Bill of Rights was not binding on the states. In *United States v. Lanza*, 260 U.S. 377 (1922), decided in 1922, the Court relied on *Fox*'s conception of dual sovereignty to uphold a federal conviction following a state prosecution for substantially the same Prohibition-era liquor offense. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 8 (1995) (citing *Lanza*, 260 F.2d at 382). Thus, by the time the Court considered *Bartkus* (and its companion case, *Abbate)*, it had a well-developed body of law to draw upon for its conclusion that a state prosecution following a federal one–or vice-versa–did not offend the Fifth Amendment.

Significantly, at the time that *Bartkus* was decided, the Fourteenth Amendment had not yet been held to incorporate the Bill of Rights. Justice Frankfurter's opinion for the *Bartkus* majority relied heavily on this consideration, noting that the Court's prior decisions had "uniformly" rejected total incorporation and that "the relevant historical materials" conclusively demonstrated the correctness of that approach. *See* Amar*, supra*, at 9 (citing *Bartkus*, 359 U.S. at 124 & n.3).

Ten years later, however, in *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court held otherwise, ruling that the Double Jeopardy Clause does in fact apply to the states. As such, *Benton* "weaken[ed] the theoretical basis of *Bartkus*, namely that states are not bound to follow the federal constitutional interpretation of the Double Jeopardy Clause." *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981); *see also All Assets*, 66 F.3d at 493. Now that both sovereigns are subject to the same constitutional command, the proposition that each can subject a person to a separate prosecution for the same offense has lost a great deal of its intellectual integrity. *See All Assets*, 66 F.3d at 497-98 (Calabresi, J., concurring).

B. Full Incorporation Has Undermined Dual Sovereignty In Other Constitutional Contexts

The "somewhat insecure foundation" supporting successive federal-state prosecutions,

Grimes, 641 F.2d at 100, is further shaken by post-incorporation developments in other areas of constitutional law. For example, prior to incorporation of the Bill of Rights against the states, the so-called "Silver Platter Doctrine" allowed federal prosecutors to introduce at trial evidence seized by state investigators in flagrant violation of the Fourth Amendment. *See Weeks v. United States*, 232 U.S. 383, 398 (1914). In *Elkins v. United States*, 364 U.S. 206 (1960), however, the Supreme Court rejected this practice precisely because the Fourth Amendment's protection against unreasonable searches and seizures now constrained state as well as federal officials. The fact that the sovereign prosecuting the offense was not the sovereign who obtained the evidence was of no moment, for "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.

The use by federal prosecutors of incriminatory testimony compelled by state officers was similarly terminated as soon as the privilege against self-incrimination was applied to the states. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57 (1964) ("Our decision today in *Malloy v. Hogan* [378 U.S. 1 (1964)] . . . necessitates reconsideration of this rule."). Again, the Court analyzed the issue from the individual's perspective, expressing a concern that under the old rule a defendant could be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each." *Id.* at 55 (internal quotation marks omitted).

Benton–which applied the Double Jeopardy Clause to the states–was decided just five years later. Strangely, however, in this context "recognition of the applicability of a constitutional right to the states has [not] occasioned a complementary retreat from a rigid doctrine of dual sovereignty." *Grimes*, 641 F.2d at 102. This is especially puzzling given the focus of the Supreme Court's analysis in *Elkins* and *Murphy* on the rights of the individual; when the Double Jeopardy Clause is "understood in these individualistic terms, it becomes difficult to accept generalized statements of sovereign interests as justifying the Clause's inapplicability to successive prosecutions by different governments." *See All Assets*, 66 F.3d at

498 (Calabresi, J., concurring). Indeed, "Alphonse Bartkus probably did not feel better off being doubly prosecuted by different governments rather than the same one." Amar, *supra* at 9.

The thread that connects the unreasonable search and compelled self-incrimination decisions extends as well to double jeopardy: "Whenever a constitutional provision is equally enforceable against the state and federal governments, it would appear inconsistent to allow the parallel actions of state and federal officials to produce results which would be constitutionally impermissible if accomplished by either jurisdiction alone." *Grimes*, 641 F.2d at 102; *see also* Amar, *supra* at 3 ("[I]t seems anomalous that the federal and state governments, acting in tandem, can generally do what neither government can do alone–prosecute an ordinary citizen twice for the same offence."). Viewed from this perspective, there is little to recommend *Bartkus*'s "formalistic conception of dual sovereignty [or] the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states." *Grimes*, 641 F.2d at 101.

C. The Expansion of Federal Criminal Law Further Undermines the Doctrine of Dual Sovereignty

Bartkus, to say nothing of *Lanza* or *Moore* or *Fox*, was decided in an era when the body of federal criminal law was much smaller and the extent of federal-state cooperation in law enforcement far less pronounced than it is today. *See id.* at 102 (noting that "these early opinions were incapable of addressing the present reality of a greatly expanded criminal law"); *All Assets*, 66 F.3d at 498 (Calabresi, J., concurring) (noting "dramatic changes that have occurred in the relationship between the federal government and the states since the time of *Bartkus*"). As the area covered by federal criminal law has expanded, defendants in an "enormous" number of cases have found themselves exposed to the risk of dual prosecutions. *All Assets*, 66 F.3d at 498 (Calabresi, J., concurring). Meanwhile, increased levels of cooperation between state and federal law enforcement officers have eroded the plausibility of "the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally

needed to protect one from the other." *Id.* at 499.

These changes have made the once-tolerable risk to individual rights posed by the prospect of successive prosecutions for a single offense "far more dangerous." *Id.* at 498. The infinitely malleable *Petite* policy cannot properly guard against these risks. Accordingly, continued reliance by the courts on the doctrine of dual sovereignty to permit successive prosecutions poses a genuine threat to core constitutional principles without countervailing justification.

Though the Supreme Court has continued to apply the dual sovereignty doctrine, it has not reconsidered it in the context of successive state-federal or federal-state prosecutions since the Double Jeopardy Clause of the Fifth Amendment was found applicable to the states. *See id.* at 493 n.8 (majority opinion). For all of the reasons described above, such reconsideration is long overdue. Mr. Simon respectfully moves the Court to dismiss the indictment because, taking into account jurisprudential developments after *Bartkus*, this successive federal prosecution violates the constitutional prohibition against being twice placed in jeopardy for the same offense.

IV. The Court Should Order the Government to Produce Discovery Relating to the Decision to Prosecute Mr. Simon In Federal Court

In *Bartkus*, the Supreme Court acknowledged that the doctrine of dual sovereignty–and thus the rationale for permitting successive prosecutions–has no place when the sovereigns are not in fact acting dually. *Bartkus*, 359 U.S. at 123-24 (suggesting that one sovereign cannot be a "tool" of another). Accordingly, the Court left open the possibility that the Constitution would be offended by a successive prosecution that "is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute." *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990); *see also United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996) (holding that Double Jeopardy Clause bars second prosecution in which prosecutor exercises "little or no volition in its own proceedings"). The

Double Jeopardy Clause may likewise preclude a second prosecution because the *first* prosecution was a "cover" or "sham" for the prosecution that was soon to follow. *See United States v. Zone*, 403 F.3d 1101, 1105 (9th Cir. 2005).

The Court's inability to enforce the *Petite* policy, therefore, does not lessen its obligation to ensure that federal and state authorities are not intentionally manipulating the system to achieve the equivalent of a second prosecution for a single offense. *See Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959). Likewise, the Court must be satisfied that one prosecuting entity is not acting as a "tool" of the other. *Id.* Either of these scenarios constitutes a so-called "*Bartkus* exception" to the dual-sovereignty doctrine and justifies dismissal of the second prosecution on double jeopardy grounds. *See United States v. Bernhardt*, 831 F.2d 181, 182-83 (9th Cir. 1987) (collusion between state and federal authorities may bar subsequent prosecution).

To date, the only discovery that the government has produced relating to its decision to prosecute Mr. Simon in federal court is the letter from the Department of Justice authorizing a deviation from the *Petite* policy. No information has been supplied that bears on the timing of the decision to prosecute Mr. Simon federally, the rationale for that decision, or the communications between state and federal law enforcement leading up to successive prosecutions. Mr. Simon must be permitted to review such material in order to determine whether the *Bartkus* exception applies. Accordingly, he respectfully requests that the Court compel the government to produce any and all evidence of communications, negotiations, and agreements between the United States Attorney's Office and the San Mateo County District Attorney's Office that is germane to the decision by the United States Attorney's Office to prosecute Mr. Simon for the same offense for which he was convicted and sentenced in San Mateo County Superior Court.

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CONCLUSION

For the reasons stated, Mr. Simon respectfully urges the Court to dismiss the indictment. In the alternative, Mr. Simon requests an order directing the government to produce discovery bearing on the decision to prosecute him a second time for one offense.

Dated: August 10, 2007

Respectfully submitted,

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Federal Public Defender

/s/

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